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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner,

v.

ANN DORE MCLAUGHLIN, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether, notwithstanding holdings to the contrary in *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980), and *Texas Independent Ginners Association v. Marshall*, 630 F.2d 398 (5th Cir. 1980), the Occupational Safety and Health Administration may promulgate an occupational health standard requiring employers to provide and pay for medical examination and testing of employees, in circumstances where there is no significant current risk to health and no factual basis for imposing any other occupational health standard.*

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* In addition to the persons named in the caption, Eula Bingham, Assistant Secretary of Labor, and the Occupational Safety and Health Administration were parties to the proceeding in the court of appeals. The opinion of the court of appeals also disposed of a separate proceeding to which the same federal officers and agencies and the Minnesota Mining and Manufacturing Company were parties.

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The National Cottonseed Products Association hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A) is reported at 825 F.2d 482.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on August 7, 1987. A timely petition for rehearing, with suggestion of rehearing *en banc*, was denied on October 23, 1987 (App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of section 3(8) and 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652(8) and 655(b) (1982), and of 29 C.F.R. § 1910.1043 (1987) are set forth at Appendix D.

STATEMENT

This case was heard by the United States Court of Appeals for the District of Columbia Circuit on a petition filed by petitioner National Cottonseed Products Association for review of an occupational health standard promulgated by the Occupational Safety and Health Administration ("OSHA") pursuant to section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (1982). The jurisdiction of the court of appeals rested on section 3(f) of the Act.

1. *Statutory background.* Section 3(8) of the Act, 29 U.S.C. § 652(8), defines the term "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Section 6(b) governs the promulgation of "any occupational safety or health standard." Section 6(b)(5) specifically provides for "standards dealing with toxic materials or harmful physical agents." Section 6(b)(7) further provides that "[i]n addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards." In this case, OSHA prescribed an occupational health standard for the cottonseed processing industry that requires medical examination and testing of employees but does not impose any limitation on exposure to a toxic material or harmful physical agent.

2. *The cottonseed processing industry.* The cottonseed processing industry comprises approximately 50 cottonseed oil mills nationwide. The mills process cottonseed into four components—oil, linters, hulls, and meal. Cottonseed oil is edible and is used in many foods for human consumption. Linters, the short fuzz fibers on the exterior of a seed, are used in cellulose products and cotton batting. Hulls, the tough outer covering of the seed, and meal, the granular material remaining after extraction of the oil, are used in animal feed.

Cottonseed processing is seasonal, and worker turnover is extremely high. 50 Fed. Reg. 51120, 51136 (Dec. 13, 1985). It is estimated that "on average only 6 percent of the workforce remain employed for a full year." *Id.* at 51171. The total industry "workforce is relatively small, about eight hundred." *Id.* at 51136. Cottonseed processing "is very much a declining industry. The number of facilities has been decreasing and many are small businesses." *Id.*

3. *Initial regulation of exposure to cotton dust in the cottonseed processing industry.* In 1971, OSHA exercised authority under section 6(a) of the Act to adopt a "national consensus standard" applicable to all industries, specifically including cottonseed processing, whose employees are exposed to cotton dust at the workplace. *See* App. A at 3a. The standard prescribed a limit of 1000 ug/m^3 on exposure to all cotton dust. *See* 50 Fed. Reg. at 51123.

In 1978, acting pursuant to section 6(b) of the Act, OSHA promulgated a new "occupational safety or health standard" by setting "permissible exposure limits of 200 ug/m^3 of lint-free respirable cotton dust, averaged over eight hours, for yarn manufacturing; 750 ug/m^3 for slashing and weaving operations; and 500 ug/m^3 for knitting and nontextile industries [including cottonseed processing] which used cotton." *Id.* at 51124. OSHA

explained that "[t]his new standard was intended to supersede the previous OSHA standard [of 1000 ug/m³]." 47 Fed. Reg. 5906 (Feb. 9, 1982). On petition for review, the limit of 500 ug/m³ on exposure to lint-free respirable cotton dust was vacated with respect to cottonseed processing because the record did not support OSHA's finding of economic feasibility for that industry. *AFL-CIO v. Marshall*, 617 F.2d 636, 669-73 (D.C. Cir. 1979), *aff'd on other grounds sub nom. American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981).

Thereafter, OSHA took the position that the limit of 1000 ug/m³ on exposure to all cotton dust remained in effect for cottonseed processing pending further rulemaking. *See* 50 Fed. Reg. at 51122. OSHA acknowledged, however, "that the cottonseed industry was not in compliance with [that limit] and that [such] compliance . . . could cause severe economic disruptions in the industry." *Id.* at 51133.

4. *OSHA's promulgation of an occupational health standard requiring medical examination and testing.* Early in 1982, OSHA undertook a "reevaluation of the occupational health standard regulating employee exposure to cotton dust." 47 Fed. Reg. at 5906. The public was asked to comment on, *inter alia*, "the evidence of risk of adverse health effects in workers exposed to cotton dust in non-textile industries." *Id.* at 5907.

In 1983, after receiving numerous comments, OSHA proposed "to eliminate from coverage from [the regulations pertaining to cotton dust] several segments of the nontextile industry [including cottonseed processing] where there is no evidence of significant risk." 48 Fed. Reg. 26962 (June 10, 1983). OSHA noted that the occupational health standard promulgated in 1978 had been based upon the assumption "that the large body of risk evidence in the textile industries could be used to support the less conclusive evidence in nontextile operations."

Id. at 26965. Because "the composition of cotton dust varies from one operation to another," *id.* at 26966, OSHA had decided "to review the existing scientific evidence to determine whether or not a significant risk of adverse health effects exists for workers . . . in each of the nontextile industries covered by the 1978 standard." *Id.* After conducting that review, OSHA had concluded that "none of the available studies provided evidence of significant long-term adverse health effects in individual workers in cottonseed processing operations that are equivalent to those currently existing in the United States." *Id.* at 26967. OSHA also had concluded that "there is a serious question as to whether [the earlier limit of 1000 ug/m^3 on exposure to all cotton dust] is economically feasible." *Id.* at 26968-69. OSHA therefore requested comments "on alternative approaches to protecting worker health in the cottonseed processing industry which would be economically feasible." *Id.* at 26969.

In late 1985, after receiving and reviewing further comments and other evidence, OSHA determined that cottonseed processing "workers exposed at levels equal to ½ to 2 times the present exposure limit do not have an increased incidence of byssinosis or bronchitis [*i.e.*, the health impairments associated with exposure to cotton dust in the textile industries] compared to controls." 50 Fed. Reg. at 51135. OSHA therefore "conclude[d] there is not sufficient evidence of significant risk which could be substantially reduced by lowering exposure limits to justify applying the exposure limit [of 500 ug/m^3] . . . to the cottonseed industry." *Id.* OSHA also "conclude[d] that a significant health risk will not develop if the 6(a) limit [of 1000 ug/m^3] is repealed for [cottonseed processing]." *Id.* at 51136. Consequently, OSHA exempted cottonseed processing from all regulatory limits on exposure to cotton dust. *Id.* at 51135.

Although it had not found any significant risk of material health impairment from exposure to cotton dust in

the cottonseed processing industry, OSHA nonetheless promulgated an occupational health standard requiring medical examination and testing of cottonseed processing workers. OSHA reasoned:

> a backstop is clearly needed with the elimination of the permissible exposure limit to assure that byssinosis and chronic bronchitis do not develop afterwards. This is especially true because cotton seed processing is a dusty process and the possibility exists that exposures will rise above current levels.
>
> In addition, there is a clear medical need for . . . medical surveillance. . . . [M]edical surveillance would allow identification of persons "unusually susceptible to adverse effects of this dust" and [of] "persons with active airway diseases . . . [who] should not be assigned to particularly dusty jobs."

Id. at 51135-36.

The new standard requires each employer in the cottonseed processing industry to "institute a program of medical surveillance for all employees exposed to cotton dust." 29 C.F.R. § 1910.1043(h)(1)(i). The employer must conduct medical testing on the first day of employment both "prior to initial assignment" and "no less than 4 and no more than 10 hours after the beginning of the work shift" and also must conduct periodic medical examinations for some employees every six months and for each employee "at least every two years." *Id.* at § 1910.1043(h)(2), (3). The medical examination and testing must be performed by or under the supervision of a licensed physician, and the employer must obtain from the physician a written medical opinion and recommendation for each employee. *Id.* at § 1910.1043(h)(1)(ii), 5(i). The employer must "establish and maintain an accurate medical record for each employee subject to medical surveillance . . . for at least 20 years." *Id.* at § 1910.1043(k)(2).

5. *Review of the health standard by the court of appeals.* The court of appeals sustained the requirement of medical examination and testing. The court acknowledged that this Court in *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980), had ruled that OSHA "must make a threshold finding of significant risk," App. A at 3a, before prescribing an occupational safety or health standard under section 6(b) of the Act. But the court of appeals "h[e]ld that this requirement is substantially modified when the sole requirement imposed is one of monitoring employee health." *Id.*

The court determined that OSHA may promulgate an occupational health standard requiring medical examination and testing whenever "there is a real possibility of significant health risks." App. A. at 8a. Although OSHA had not explicitly found even that "real possibility," the court believed that the necessary finding was implicit in OSHA's explanation of why medical examination and testing was being required. *Id.*

REASONS FOR GRANTING REVIEW

The court of appeals has held that OSHA may promulgate an occupational health standard requiring employers to provide and pay for medical examination and testing of employees in circumstances where there is no significant current risk to health and no factual basis for imposing any other occupational health standard. This holding conflicts with the decision of this Court in *Industrial Union Department* and with that of the Fifth Circuit in *Texas Independent Ginners Association v. Marshall*, 630 F.2d 398 (5th Cir. 1980).

The issue is important. The decision below empowers OSHA, without the bothersome necessity of first finding that working conditions pose a real and discernible risk to health, to direct employers in each and every industry in the United States to furnish medical examination and

testing for employees. OSHA can do this, according to the court of appeals, as a means of monitoring working conditions to determine whether they continue to be safe. The Act does not sanction that.

Providing medical examination and testing is costly and burdensome. Placing the responsibility on employers to conduct such medical surveillance, merely as a means of gathering information and where there is no significant current risk to health, is akin to exacting a special tax for the purpose of funding government research. Congress did not intend the device of mandatory occupational health standards to be used for that purpose or in such an intrusive and indiscriminate manner.

1. *The decision below conflicts with* Industrial Union Department *and* Texas Independent Ginners. In *Industrial Union Department*, this Court struck down an occupational health standard relating to exposure to benzene at the workplace. Justice Stevens, writing for a plurality of four Justices, reasoned that every occupational health standard must "satisfy the basic definition in § 3(8)." 448 U.S. at 642. Section 3(8) applies "to all permanent standards promulgated under the Act and . . . it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment." *Id.* at 639.

> By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe . . . [A] workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.
>
> Therefore, before he can promulgate *any* permanent health or safety standard, the Secretary is re-

> quired to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices. This requirement applies to permanent standards promulgated pursuant to § 6(b)(5), as well as to other types of permanent standards.

Id. at 642 (emphasis in original). The benzene standard was invalid "[b]ecause the Secretary did not make the required threshold finding." *Id.* at 640.[1]

The court of appeals in this case held that OSHA was *not* required to make a threshold finding of significant risk, stating that "an unusually precise dictum in [*Industrial Union Department*] applies to this case and sanctions the Secretary's determination." App. A. at 4a. The court relied upon the following passage from the plurality opinion in *Industrial Union Department*:

> [I]n setting a permissible exposure level in reliance on less-than-perfect methods, OSHA would have the benefit of a backstop in the form of monitoring and medical testing. Thus if OSHA properly determined that the permissible exposure level should be set at 5 ppm, it could still require monitoring and medical testing for employees exposed to lower levels. By doing so, it could keep a constant check on the validity of the assumptions made in developing the permissible exposure limit, giving it a sound evidentiary basis for decreasing the limit if it was initially set too high.

448 U.S. at 657-58 (footnotes omitted). The court of appeals concluded that if medical surveillance may be used as a backstop when OSHA has set a permissible ex-

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[1] Justice Rehnquist concurred in the judgment on the ground that section 6(b)(5) of the Act is a standardless delegation of legislative authority, the enactment of which was not constitutionally justified by inherent necessity. *See* 448 U.S. at 671-88.

posure level based upon a finding of significant risk, such surveillance also may be required when OSHA has found no significant risk and has imposed no permissible exposure level. That conclusion is an obvious *non sequitur*.

The court of appeals misread the passage from *Industrial Union Department* on which it relied. In that passage, the plurality merely described the use of monitoring and medical testing as an adjunct to a validly imposed permissible exposure level. The passage does not imply that a requirement of medical surveillance could be imposed on its own, in the absence of a permissible exposure level or other substantive health standard. Nor does the language of section 6(b)(7) contemplate a free-standing requirement of medical surveillance. It merely authorizes OSHA to require medical examinations as an "addition, where appropriate," to an otherwise valid substantive health standard.

But even if section 6(b)(7) could be read as authorizing the imposition of a free-standing requirement of medical surveillance, OSHA still would have to make the threshold finding identified in *Industrial Union Department*. An occupational health standard prescribing medical examination and testing pursuant to section 6(b)(7), no less than one imposing a permissible exposure level pursuant to section 6(b)(5), must satisfy the basic definition of section 3(8). That definition governs "*all* permanent standards promulgated under the Act," 448 U.S. at 639 (plurality opinion) (emphasis added), and thus a threshold finding of a significant risk to health must be made before OSHA "can promulgate *any* permanent health or safety standard." *Id.* at 642 (emphasis in original). The occupational health standard prescribed by OSHA for the cottonseed processing industry does not pass muster. Because "the agency simply did not find evidence of significant risk," App. A. at 8a, it had no lawful basis for requiring medical examination and testing.

The court below erred in reading the "unusually precise dictum" in *Industrial Union Department* as carving out an exception from the requirement of a threshold finding of significant risk. The occupational health standard there at issue not only established a permissible exposure level for benzene but also required employers "to provide semiannual medical examinations for their exposed employees." 448 U.S. at 627 (plurality opinion). Four Justices believed that the benzene standard was valid in its entirety. *See* 448 U.S. at 688-724 (Marshall, J., dissenting). Another three Justices (those subscribing in full to the plurality opinion) believed that the benzene standard was invalid only because it had not been based upon a finding of significant risk of material harm.[2] If, as the court below concluded, a requirement of medical examination and testing may be imposed even in the absence of a finding of significant risk, seven members of this Court would have voted to sustain the separate portion of the benzene standard that imposed that requirement. But the Court invalidated the entire standard, including the requirement that employers provide medical examinations. The decision below thus conflicts both with the plurality's reasoning in *Industrial Union Department* and with the Court's disposition of the case on the merits.

The decision below also squarely conflicts with the Fifth Circuit's holding in *Texas Independent Ginners*. There, as here, OSHA had prescribed an occupational health standard for an industry, cotton ginning, whose employees are exposed to cotton dust. As in this case, OSHA had not found a risk to health sufficient to justify the imposition of a permissible exposure level, but it had required employers to "provide medical surveillance of ex-

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[2] Justice Powell, who joined in most of the plurality opinion, believed that the benzene standard also was invalid because OSHA had failed to determine whether economic costs bore a reasonable relationship to expected benefits. *See* 448 U.S. at 664-71.

posed employees." 630 F.2d at 402. The Fifth Circuit, reasoning that "[t]he Act authorized only those OSHA regulations that are elicited by a significant risk of unsafe or unhealthful employment or workplaces, and that are reasonably necessary or appropriate to reduce that risk," *id.* at 405, struck down the requirement of medical surveillance "because OSHA has not found as a 'threshold matter' that cotton dust poses a 'significant health risk' in cotton gins . . . and that a standard is 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'" *Id.* at 406.[3]

2. *Even apart from those conflicts, the decision below was incorrect and the issue is important.* The lower court's determination in this case that a requirement of medical examination and testing may be imposed under section 6(b)(7) of the Act upon the finding of a mere "possibility" of health risks, App. A. at 8a, is pure invention. It has no basis in the statutory text or legislative history. "The Act is intended only to guard against significant risks, not ephemeral possibilities." *Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96, 104 (2d Cir. 1981).

Section 6(b)(7) itself provides no guidance concerning when OSHA may require employers to conduct medical examination and testing. If that provision stood alone, it would run afoul of "the nondelegation principle of separation of powers." *Industrial Union Department*, 448 U.S. at 674 (Rehnquist, J., concurring). But section 6(b)(7) does not stand alone. It permits the imposition of medical surveillance only as an "occupational safety and health standard," as defined by section 3(8), and it contemplates that such surveillance will be only one component of an occupational health standard dealing more

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[3] Although *Texas Independent Ginners* was discussed in the parties' briefs, the court below did not refer to that case in its opinion.

broadly with a toxic material or harmful physical agent pursuant to section 6(b)(5). In view of this relationship among the three provisions, there is no statutory warrant for the lower court's conclusion that the promulgation of health standards under section 6(b)(7) uniquely may be based upon a different and lower threshold finding. Section 6(b)(7) necessarily incorporates the legislative standards of sections 3(8) and 6(b)(5). The Act contemplates that OSHA must make the same adequate threshold finding of risk for all occupational health standards.

At bottom, the decision below reflects the lower court's belief that it is appropriate for OSHA to require employers to provide and pay for medical examination and testing of employees solely for the purpose of gathering data concerning possible or potential risks to health. That belief is in error:

> Congress conceived [an occupational health] standard as a remedial measure addressed to a specific and already identified hazard, not as a purely administrative effort designed to uncover violations of the Act and discover unknown dangers. In short, standards should aim toward correction rather than mere inquiry into possible hazards.

Louisiana Chemical Association v. Bingham, 657 F.2d 777, 782 (5th Cir. 1981).

OSHA sought to justify its "inquiry into possible hazards" in this case on the ground that, because cottonseed processing was being exempted from the exposure limit of 1000 ug/m^3 that earlier had been imposed under section 6(a), "the possibility exists that exposures will rise above current levels." 50 Fed. Reg. at 51135. This was rank speculation, with no basis in the rulemaking record. There had been substantial uncertainty, even within OSHA, concerning whether the 1000 ug/m^3 limit had remained in effect at all after 1978. *Compare* 47

Fed. Reg. at 5906 (the 500 ug/m^3 limit on lint-free respirable cotton dust promulgated in 1978 "supersede[d] the previous OSHA standard" of 1000 ug/m^3 in all cotton dust) *with* 50 Fed. Reg. at 51122 (asserting that the limit of 1000 ug/m^3 remained in effect). Whether or not the 1000 ug/m^3 limit technically remained in effect, OSHA had conceded that the limit was not economically feasible and that cottonseed processors were not complying with it. *Id.* at 51133. Exempting cottonseed processing from a limit that had not been generally understood to be in effect, and that had not been complied with, was unlikely to cause an increase in exposure levels.

Of course, there is always a theoretical possibility in any industry that a change in working conditions may result in increased exposure to potentially unhealthful materials or agents. If such a merely theoretical possibility of increased exposure justified promulgation of an occupational health standard requiring medical examination and testing, OSHA could promulgate such a standard for every industry in the United States.

Medical surveillance is both costly and enormously inconvenient for the employer. This is especially true in the cottonseed processing industry. Cottonseed oil mills are located in rural areas where physicians are scarce. During the processing season, the mills operate around the clock; employee turnover is extremely high, and new workers may be hired on any day and for any shift. The occupational health standard that OSHA has imposed requires that, on his first day of work, each new employee be given two medical examinations conducted "by or under the supervision of a licensed physician," one before the start of work and a second "no less than 4 and no more than 10 hours after the beginning of the work shift." 29 C.F.R. § 1910.1043(h)(1)(ii), (2)(iii). This requirement is both expensive and wholly insensitive to the realities of the workplace.

Other industries can expect to encounter similar costs and inconveniences. Such burdens on private industry might be reasonable where the workplace has been shown to be hazardous. But they are wholly unreasonable when OSHA's objective is the mere collection of data.

Congress foresaw that there would be situations, like that presented in this case, where OSHA would desire to gather additional data on a continuing basis even though it was unable to identify any significant risk of harm currently existing at the workplace. To deal with such situations, Congress empowered the National Institute of Occupational Safety and Health ("NIOSH") to conduct wide-ranging research relating to occupational health, including the conduct of "such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses." Section 20(a)(5) of the Act, 29 U.S.C. § 669(a)(5). NIOSH also is authorized, under section 22(d) of the Act, 29 U.S.C. § 671(d), to conduct research and experimental programs for the development of new or improved health standards. Congress did not authorize OSHA to bypass NIOSH, and to impose the cost of gathering data directly on the employer, in the absence of a finding of an actual and significant current risk to health.[4]

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[4] Indeed, section 6(b)(7) provides that, even when an appropriate finding has been made, the government may defray the cost of "such medical examinations [as] are in the nature of research."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 78-2014, 86-1075 and 86-1157

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner,

v.

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor and EULA BINGHAM, Assistant Secretary of Labor, United States Department of Labor; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, United States Department of Labor,
Respondents.

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner,

v.

WILLIAM E. BROCK, Secretary of Labor,
U.S. Department of Labor, *et al.*,
Respondents.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION, *et al.*,
Respondents.

Argued Jan. 16, 1987

Decided Aug. 7, 1987

As Amended Aug. 13, 1987

Before ROBINSON, GINSBURG and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RUTH B. GINSBURG and Circuit Judge WILLIAMS.

RUTH B. GINSBURG, Circuit Judge, and WILLIAMS, Circuit Judge:

Two remnants of the cotton dust rulemaking are presented to us following extensive judicial and administrative consideration of the regulations. *See AFL-CIO v. Marshall*, 617 F.2d 636 (D.C.Cir.1979), *aff'd in part sub nom. American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981); *see generally* 50 Fed.Reg. 51,123-25 (1985). The first challenge, pressed by the National Cottonseed Products Association (NCPA), concerns Occupational Safety and Health Administration (OSHA) prescriptions for medical surveillance of workers exposed to cotton dust. The second challenge, framed by Minnesota Mining and Manufacturing Company (3M), concerns OSHA's effectiveness rating for the disposable respirators that 3M manufactures. We conclude that OSHA acted within its statutory authority and on a rational basis; we therefore deny the petition for review.

I. NCPA Petition

NCPA raises a question as to the scope of the Supreme Court's holding in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) [hereinafter *Ben-*

zene], that OSHA, in promulgating standards for toxic substances under § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b) (1982), must make a threshold finding of significant risk. We hold that this requirement is substantially modified when the sole requirement imposed is one of monitoring employee health, and that the Secretary's findings here are sufficient. NCPA also claims that the monitoring requirements are not feasible for the cottonseed industry; we reject the contention.

A. *Background*

Section 6(a) of the OSH Act, 29 U.S.C. § 655(a) (1982), authorizes OSHA to adopt any "national consensus standard" as one of its own. In 1971 OSHA exercised this power as to cotton dust, adopting the 1000 ug/m³ permissible exposure limit ("PEL") that had been promulgated under the Walsh-Healey Act, 41 U.S.C. § 35(e) (1982). Section 6(b) of the OSH Act authorizes independent promulgation of standards, and in 1978 OSHA exercised that grant. Determining that the dust generated by cottonseed mills posed a material risk to cottonseed workers' health, it set a PEL of 500 ug/m³ and required employers to adopt medical surveillance programs. 43 Fed.Reg. 27,350 (1978). On appeal, this court agreed that exposure to cotton dust presented a material risk of harm, but remanded for reconsideration or further explanation of the standard's economic feasibility. *AFL-CIO v. Marshall*, 617 F.2d 636, 666-73 (D.C.Cir.1979), *aff'd on other grounds sub nom. American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981). Thus, the 500 ug/m³ PEL has never taken effect but the 1000 ug/m³ limit has remained in place continuously since 1971.

On remand, the agency reconsidered both the need for dust regulations in the cottonseed industry and their feasibility. 47 Fed.Reg. 5906 (1982). During this rule-

making new studies of the domestic cottonseed industry came to light, indicating that, contrary to the Secretary's previous findings, "excess byssinosis and bronchitis are not present among U.S. cottonseed workers." 50 Fed. Reg. 51,120, 51,135 (1985). However, the record also indicated that a subset of hypersensitive workers suffers from respiratory ailments, as do a very high percentage of workers in foreign cottonseed mills (where dust levels are much higher), and that the precise causal link between cotton dust and respiratory harm remained unknown. *Id.*

From these findings the Secretary determined that the risk of material harm to cottonseed workers would not be "significant" even without a PEL, so long as medical surveillance was retained as a "backstop." The backstop mechanism would protect hypersensitive workers and safeguard against risks stemming from the current inability to pinpoint the exact link between cotton dust and serious respiratory ailments. *Id.* at 51,135-36. Finding the facilities and personnel necessary for medical surveillance to be available at a cost that appeared trivial in relation to the industry's gross revenues, the Secretary concluded that medical surveillance was technologically and economically feasible and required it. *Id.* at 51,171.

B. *Significant Risk*

NCPA alleges that the Secretary's failure to find that the current level of dust in cottonseed mills presents a signficant risk to workers' health precludes him, under *Benzene*, from imposing *any* § 6(b) standard, including one limited to medical surveillance. We disagree; an unusually precise dictum in *Benzene* applies to this case and sanctions the Secretary's determination.

In *Benzene*, the Court reviewed an OSHA regulation reducing the PEL for benzene from 10 parts per million (ppm) to one ppm. In lowering the standard OSHA

never adduced any evidence that exposures at 10 ppm presented a risk to workers. Rather, OSHA took the position that it was entitled (and possibly obligated) to lower the PEL to the maximum extent feasible simply because benzene was a carcinogen for which no level of exposure had been proven absolutely harmless. *Benzene*, 448 U.S. at 652, 100 S.Ct. at 2869. Under OSHA's interpretation of the law, this regulatory power would be constrained only if industry established, apparently "beyond a shadow of a doubt," that there was a safe level of exposure. *Id.*

The Court strongly rejected the notion that OSHA is entitled to regulate any risk, no matter how small or speculative, to the limits of feasibility. The OSH Act, the Court held, empowers OSHA to regulate only hazards presenting a "significant risk" of material harm to workers' health.[1] Thus, before OSHA could reduce the existing PEL, it had "the burden . . . to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment." *Id.* at 653, 100 S.Ct. at 2869.

Here OSHA found that abandoning both the 1000 ug/m^3 and the 500 ug/m^3 PELs would not leave workers exposed to a significant risk. Accordingly, NCPA contends that under *Benzene* OSHA may issue no regulatory restrictions at all. We believe, however, that *Benzene* dictates a significant risk analysis for monitoring requirements considerably laxer than for other workplace standards.

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[1] In a subsequent decision the Court held that once the risk posed by a toxic substance is determined to be significant, the Act compels OSHA to adopt regulations providing workers the maximum protection feasible, and does not permit OSHA to engage in cost-benefit analysis. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981).

The *Benzene* Court considered the possibility that OSHA might impose a standard but remain uncertain whether the residual risk was significant. It made clear that OSHA could in such a case impose monitoring requirements as a "backstop," in order to (1) check the validity of its assumptions in imposing the standard selected, (2) develop a sound evidentiary basis for decreasing the limit if it proved to have been set too high, and (3) ensure that unusually susceptible workers could be removed from exposure before they suffered permanent damage. 448 U.S. at 657-58, 100 S.Ct. at 2871-72.

NCPA appears to acknowledge that this discussion is to be taken seriously despite its technical status as dictum. It claims, however, that the statement is applicable only if (1) the substance is toxic and "at some reasonably attainable level" causes harm, and (2) there is a relationship between worker exposure and health effects (a "dose-response" relationship). The Court's discussion does not impose either of these conditions, but we take NCPA in essence to argue that the Court's approval of monitoring would be senseless otherwise: why monitor if there is no chance of harm at levels that may come about? We think the evidence of risk before OSHA justifies application of the Court's dictum.

In assessing whether harm exists at any "reasonably attainable" level, OSHA is hampered by the ambiguous relation between reality and the pre-existing regulation. Although it is agreed that the industry has not complied with the 1000 ug/m^3 standard (nor *a fortiori* that of 500 ug/m^3), *see* 50 Fed.Reg. 51,133 and 48 Fed.Reg. 26,968, there is no concession that the regulations of the past 16 years have been absolutely without effect. *See* 50 Fed.Reg. 51,133, 51,136; 48 Fed.Reg. 26,968; 43 Fed. Reg. 27,381; *see also* Joint Appendix ("J.A.") at 311 (study finding that only two of 18 mills had mean exposures greater than 1000 ug/m^3). Accordingly, OSHA could fairly infer that removal of the existing PEL (and

cancellation of the abortive one of 500 ug/m^3) could lead to higher levels of exposure, to the detriment of workers' health.

The record indicates that even the levels of exposure prevailing with the standard in effect pose some risk to workers' health. For example, a recent National Institute for Occupational Safety and Health ("NIOSH") test that is heavily relied upon by all parties found that although cottonseed workers did not experience increased incidence of byssinosis, as a group they suffered from decreased lung functions; the smokers among them were afflicted with chronic coughs. *Respiratory Disorders and Dust Exposure in Sectors of the Cotton Industry of the United States. Part 3: Cottonseed Oil Mills* v, J.A. at 307, 311. The series of studies by the Tulane Group reached similar conclusions, Jones, Hammond, Butcher & Weil, *Respiratory Health in Cottonseed Crushing Mills*, J.A. at 263-66, and also indicated that 52% of the workers studied were current smokers, 20% were ex-smokers, and 15% had allergies, *id.*, J.A. at 264-65. The health organizations and physicians testifying on record overwhelmingly felt that medical surveillance was necessary. *E.g.*, J.A. at 311 (NIOSH), 968-70 (Dr. Jones of Tulane Group), 978 (Dr. Merchant), 987 (Dr. Engleberg). (Indeed, with one prominent exception, Dr. Jones, they recommended that a PEL be retained.)

While it is true that no dose-response relation can be affirmatively established under conditions of American cottonseed processing, 50 Fed.Reg. 51,135, broader evidence supports its existence. Foreign cottonseed workers, who are subject to markedly higher doses than American ones, evidently suffer significant health effects. *See, e.g.*, Noweir, El-Sadeh & El-Dahhahny, *Exposure to Dust in the Cottonseed Oil Extraction Industry*, 19 Arch. Environ. Health 99 (1969), J.A. at 154 (35 of 110 workers examined in Egyptian cottonseed plants exhibited byssinotic symptoms); Barnes & Simpson, *Ventilatory Capacity*

Changes on Exposure to Cotton Dust, Med. J. of Australia 897 (May 25, 1968), J.A. at 159 (study undertaken in response to worker complaints of wheezing and tightness of the chest found link to cotton-dust exposure). *See also* 53 Fed.Reg. 51,135.

Because of this evidence, OSHA rested its finding of no significant risk on "the assurance that retention of medical surveillance will provide a backstop if that judgment is incorrect and this surveillance will protect the health of the employees." [2] 50 Fed.Reg. 51,136. Of course this cannot turn the finding of no significant risk into its opposite; the agency simply did not find evidence of significant risk. We do take the statement, however, to invoke the conditions suggested by the Supreme Court in *Benzene* for a backstop monitoring requirement: a finding that the "less-than-perfect" evidence indicates that there is a real possibility of significant health risks under the other aspects of the standard adopted (here, no regulation at all). *See Benzene*, 448 U.S. at 657-58, 100 S.Ct. at 2871-72.

C. *Feasibility*

OSHA's standards must be technologically and economically feasible, *see, e.g., American Textile Manufacturers Institute v. Donovan*, 452 U.S. at 513 n. 31, 101

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[2] NCPA argues that this conclusion is impermissibly inconsistent with the Secretary's determination that other nontextile industries—namely knitting and warehousing—require only a longitudinal study as a backstop. As to the knitting industry, however, the link between exposure to dust at present levels and respiratory ailments appears less significant, 50 Fed.Reg. 51,131; J.A. at 408 (NIOSH comments); operations are inherently less dusty, 50 Fed.Reg. 51,131; and medical experts were less adamant on the need for medical surveillance, *see* J.A. at 975-76 (testimony of Dr. Merchant). The data available for the warehousing industry were largely inconclusive, 50 Fed.Reg. 51,139; J.A. at 975-76 (testimony of Dr. Merchant); and work areas in that industry tend to be open with substantial natural ventilation, 50 Fed.Reg. 51,139.

S.Ct. at 2492 n. 31; NCPA contends that the medical surveillance requirements are neither.

The standard requires that cottonseed workers be given an initial examination and follow-up examinations every two years thereafter if the employee manifests no signs of respiratory problems and every six months if he does. 29 C.F.R. § 1910.1043(h)(2), (3) (1986). Each examination involves the compilation or updating of the subject's medical history, the completion of a standardized questionnaire, and a pulmonary function test. A licensed physician must supervise the program (but need not conduct all facets of the examination in person, *id.* § 1910.1043(h)(1)). The physician must also issue an opinion summarizing the results of the examination, stating whether the employee has any medical conditions which would place him at increased risk of health impairment from exposure to cotton dust, and recommending limitations to be placed on the employee's exposure. *Id.* § 1910.1043(h)(5).

NCPA finds technological infeasibility in OSHA's failure to establish that the consulting services, local clinics, and in-shop medical centers expected to conduct the examinations are currently in place and ready to serve. Of course, this deficiency is overwhelmingly likely; resources are unlikely to be allocated to such an activity until the requirement attracts them there. Accordingly, it is no surprise that the law requires OSHA to demonstrate only that it is reasonable to expect that such "technology" will develop in response to the standard's promulgation. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1264-65 (D.C. Cir.1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981). As NCPA suggests no reason to suppose that it will not develop, the sole question is whether compliance with the standard is economically feasible. *See id.*

We have indicated that a standard is economically feasible if the cost of compliance does not threaten the

"competitive structure or posture" of the industry. *Industrial Union Department v. Hodgson*, 499 F.2d 467, 478 (D.C.Cir.1974); *see also United Steelworkers*, 647 F.2d at 1264-65. Thus if compliance were likely to disable the industry from competing with substitute products, or markedly to increase concentration within the industry, a finding of infeasibility would be appropriate. *See Industrial Union*, 499 F.2d at 478.

OSHA estimated the total cost of complying with the standard at $70,671. Comparing this estimate to the industry's annual gross revenues of $777.6 million, OSHA concluded that imposition of the standard was economically feasible.

Even for evaluating the industry's overall prospects for survival, the method is a crude one. If demand for industry products were highly price elastic, a very small price increase could force closure of a substantial segment of the industry. Nonetheless, on the hypothesis that very high price elasticities are rare, it is surely appropriate for OSHA to infer that a cost amounting to a tiny fraction of gross revenues (on OSHA's estimates, less than .01%) will not force a material segment of the industry out of business.

NCPA accepts the general approach, but offers some complaints about OSHA's figures. OSHA's cost estimate of $70,671 is based on an average cost per examination of $79. In deriving this figure, OSHA started with the median estimated cost per examination identified by an NCPA survey of 36 cottonseed mills, $60, a figure consistent with all other estimates on record. *See* 50 Fed. Reg. 51,170. Reliance on a median estimate might often be misleading in assessing a standard's impact on industry structure. It might, for example, conceal a significant group of firms laboring under a special disability and likely to fail as a result of enforcement. NCPA indeed contends that such a group exists—small firms located

far from suitable testing spots. In fact, however, NCPA's own data, submitted to OSHA as part of the rulemaking proceeding, show no significant link between above-median estimated examination costs and firm size or remoteness. *See* J.A. at 640-41. Further, the record contains some evidence that the highest cost estimates might be reduced in practice. *See* J.A. at 165. On these facts, accordingly, we are not persuaded that OSHA's focus on median figures caused it to overlook a likely impact on competitive structure.

OSHA then increased its base estimate by adding $15 (three hours at $5/hour[3]) to account for lost production and $4 to cover transportation costs,[4] yielding a total cost per examination of $79. 50 Fed.Reg. 51,170-71. It then multiplied by 817, the number of jobs in the industry, reflecting an assumption that there would be an annual "new hire" for every job. This produced $64,543, to which OSHA added the cost of retesting those workers that remained employed in the industry for two years and arrived at the $70,671 total figure. With the minor exception noted below, OSHA has accounted for every element of expense likely to flow from its standard.

NCPA notes correctly that OSHA's cost estimate omits the cost of providing follow-up examinations every six months to workers who manifest symptoms of respiratory problems. As hypersensitive workers are a major reason for requiring medical surveillance, it was clear error for OSHA to have ignored these costs. Nonetheless, we find the error harmless. *See Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C.Cir.1970), *cert. denied*,

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[3] Cottonseed workers reportedly earn minimum wage. 50 Fed. Reg. 51,171.

[4] This results in some double counting as the NCPA estimates from which OSHA derives its base estimate already factor in transportation costs. J.A. at 630.

403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971). Given the industry's high turnover rate, only a fraction of these workers will actually require a follow-up exam. Moreover, if employers implement physicians' recommendations to place hypersensitive workers in less dusty jobs, symptoms of respiratory ailments should decline, alleviating the need for future follow-up exams. We see no reason to believe that OSHA's error on this point could have had more than a trivial effect on the cost of compliance relative to the industry's total revenues.

II. 3M Petition

OSHA's regulations place ceilings on cotton dust concentrations to which workers may be exposed. *See, e.g.*, 29 C.F.R. § 1910.1043(c)(1)(i) (1986) (limiting cotton dust exposure to 200 ug/m^3 in yarn manufacturing and cotton washing operations). If worker exposure exceeds the OSHA decreed PEL, or if employees wish to reduce their exposure below the PEL, the employer is obliged to furnish respirators. *Id.* § 1910.1043(f)(1). Two factors together determine respirator effectiveness: filter efficiency and the "fit factor," *i.e.*, the extent to which leakage occurs between the respirator face and seal and the wearer's face.

OSHA's effectiveness ratings (or "protection factors") are tied to particular respirator styles. *See id.* § 1910.1043(f) ("supplied air respirators" have a rating of ten; "high efficiency particulate filter respirators with a full facepiece" have a rating of fifty). The protection factor indicates OSHA's estimate of the amount of cotton dust filtered. The higher the number, the more successful the filter; a rating of ten means only one of ten dust particles is not filtered. Thus, a respirator with a protection factor of ten will permit work in environments laden with cotton dust concentrations up to ten times the PEL.

In 1978, OSHA adopted a protection factor of five for "single-use respirators." [5] The absence of a reliable test for proper fit, not filter efficiency, accounted for the low rating. *See* 43 Fed.Reg. 27,386 (1978).[6] This 1978 rating was not challenged in court.

Between 1978 and 1983, 3M and other respirator producers developed a "disposable respirator" similar in construction (material and dimensional characteristics) to the single-use respirator.[7] On the basis of filter efficiency, NIOSH rated this respirator at ten. With no guideline in the 1978 OSHA regulations explicitly covering the newly developed disposable respirators, the cotton industry apparently treated them as having a protection factor of ten.

During its review of the cotton dust regulations between 1983 and 1985, OSHA concluded that testing for snug fit on a daily basis remained infeasible for any

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[5] A single-use respirator is similar in shape to, but more rigid than, a surgical mask. Unlike gas-mask style respirators that have air intake and exhale valves, the entire surface area of the single-use respirator is the filter.

[6] Using a gas-mask style respirator, the wearer can easily block the air flow valves, breathe deeply, and determine whether air is escaping from the face seal. For the single-use respirator, however, it is difficult, if not impossible, for the wearer to cover the entire surface area, but not the seal between the respirator and the wearer's face. Alternative tests for proper fit that do not require blocking air intake (*i.e.*, spraying into the air a test agent incapable of penetrating the respirator filter and seeing if the wearer can detect that agent's distinctive odor, taste or irritation) were unavailable in 1978 for the single-use respirator because all known test agents permeated its filter element.

[7] According to comments 3M made to OSHA, the sole notable difference between the 1978 single-use respirator and the 1983 disposable respirator is filter efficiency. J.A. at 626-27. For both types, because the filter is inseparable from the respirator, when the filter clogs with dust, making breathing difficult, the entire respirator is thrown away. In its 1985 rule, OSHA classified as disposable all respirators with inseparable filters.

respirator constructed like the single-use respirator, *i.e.*, one in which the filter constitutes the entire surface area of the respirator.[8] Finding no justification for treating single-use and later developed disposable respirators differently, the agency rated both at five. 3M urges that OSHA acted arbitrarily in refusing to set the effectiveness rating for disposable respirators at ten.

A. *Standing*

OSHA asserts initially that 3M lacks standing to petition for review. *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C.Cir.1985), appears to us dispositive of this threshold issue. Under that decision's analysis, 3M is a proper petitioner for judicial review.

In *FAIC Securities*, a deposit broker[9] and a national trade association whose members include deposit brokers successfully challenged as unlawful certain Federal Home Loan Bank Board and Federal Deposit Insurance Corporation regulations. The regulations in question altered federal insurance coverage of $100,000 *per depositor*, per financial institution by adding this qualification: in the case of funds deposited by or through a deposit broker, insurance coverage would be limited to $100,000 *per broker*, per financial institution. The deposit brokers alleged that the challenged regulations contravened the Federal Deposit Insurance Act ("FDIA") and the National Housing Act ("NHA"). They would be put out of business by the altered regulations, the brokers remonstrated, and their customers consequently would be deprived of the

[8] OSHA recognized the availability by 1983 of a new test agent that would not permeate the single-use respirator's filter element. *Cf. supra* note 6. OSHA explained, however, that this test, the saccharin QLFT, developed for use at intervals of several months, was too time-consuming to be used on a daily basis. 50 Fed.Reg. 51,154 (1985).

[9] A deposit broker assists investors in placing deposits advantageously. *See FAIC Securities*, 768 F.2d at 355.

benefits of placing deposits through a broker. The Federal Home Loan Bank Board, as defendant-appellant in *FAIC Securities*, contested the brokers' standing; the Board argued that the brokers failed the prudential "zone of interest" test announced in *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 156, 90 S.Ct. 827, 831, 25 L.Ed.2d 184 (1970),[10] because " '[t]he NHA and the FDIA are intended to protect the security of depositors, banks and thrifts, not the profits of deposit brokers.' " *FAIC Securities*, 768 F.2d at 356 (quoting Brief for Appellant Bank Board at 52).

Writing for the court in *FAIC Securities*, then Judge (now Justice) Scalia endeavored to analyze coherently "the confused field of *jus tertii* standing." *Id.* at 360. He concluded that, under current Supreme Court precedent, notably *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983), *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), and *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), vendors could meet the prudential requirement even if they did not independently fulfill the "zone" test; it would do for this purpose if their customers or potential customers passed the test. *FAIC Securities*, 768 F.2d at 358.

The depositors, all agreed, fit within the protective zone of the NHA and FDIA, and the broker-depositor relationship fit the vendor-vendee description. Supreme Court decisions, Judge Scalia observed, treat the interests of

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[10] The Supreme Court addressed the "zone" test most recently in *Clarke v. Securities Indus. Ass'n*, —— U.S. ——, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and there observed that "[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 757 (footnote omitted); *see also id.* at 757 n. 15 (disapproving as excessively demanding this court's formulation of the zone test in *Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C.Cir.), *cert. denied*, 454 U.S. 881, 102 S.Ct. 363, 70 L.Ed.2d 190 (1981)).

vendors and vendees as "two sides of the same coin." *Id.* at 359. High Court precedent, he determined, allows vendors to base their standing on their relationship to vendees, and to assert the interest of those vendees, even if no impediment exists to a suit by the vendees themselves. *Id.* at 360-61; *see Block v. Meese*, 793 F.2d 1303, 1309 (D.C.Cir.1986) (citing with approval the analysis in *FAIC Securities*).

In a more recent decision, *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 811 & n.13 (D.C.Cir.1987), a divided panel questioned the reasoning, although not the result, in *FAIC Securities*. Judge Bork, writing for himself and Judge Buckley in *Haitian Refugee Center*, thought the analysis in *FAIC Securities* flawed because Judge Scalia's opinion did not advert to the Supreme Court's decisions in *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), and *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974). *See Haitian Refugee Center*, 809 F.2d at 811.

Payner rejected third party invocation of the exclusionary rule. The decision rests on fourth amendment, not standing law, analysis. *See Rakas v. Illinois*, 439 U.S. 128, 132-38, 99 S.Ct. 421, 424-28, 58 L.Ed.2d 387 (1978); *United States v. Salvucci*, 448 U.S. 83, 87 n.4, 100 S.Ct. 2547, 2551 n.4, 65 L.Ed.2d 619 (1980) ("In *Rakas*, this Court discarded reliance on concepts of 'standing' in determining whether a defendant is entitled to claim the protections of the exclusionary rule. The inquiry, after *Rakas*, is simply whether the defendant's rights were violated by the allegedly illegal search or seizure."). *Rakas* explained that the exclusionary rule is but one form of remedy afforded for fourth amendment violations; denial of this remedy to those invoking the fourth amendment rights of others, the Court reasoned, was appropriate in view of the "substantial social cost [of keeping] [r]elevant and reliable evidence . . . from the trier of fact and

[deflecting] the search for truth at trial." 439 U.S. 128, 134, 137, 99 S.Ct. 421, 425, 427, 58 L.Ed.2d 387 (1978). *Cf.* Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. Miami L.Rev. 393, 459-61 (1981) (litigant is generally not positioned to seek damages for violation of a third person's rights).

California Bankers Ass'n also involved a fourth amendment challenge.[11] Moreover, even if one read that less than crystalline 1974 decision to deny that a vendor-vendee relationship is enough to permit third-party standing, pre-1976 High Court precedent, as Judge Scalia pointed out, has been overtaken by the Court's later decisions. *See FAIC Securities*, 768 F.2d at 359.

The discussion of *FAIC Securities* in *Haitian Refugee Center* was both brief and unessential to the majority's decision.[12] The suggestion that *Payner* and *California Bankers Ass'n* undermine the reasoning in *FAIC Securities* does not appear compelling in light of the special fourth amendment contexts in which those two Supreme Court dispositions are embedded. *See* Monaghan, *Third Party Standing*, 84 Colum.L.Rev. 277, 279 n. 9, 292 n.

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[11] In *California Bankers Ass'n*, the Court first concluded that all litigating bank depositors lacked standing, then declined to permit a bank or banking association to assert the rights of any depositor. 416 U.S. at 69, 94 S.Ct. at 1521. The *Haitian Refugee Center* majority opinion suggests that the Court in *California Bankers Ass'n* denied the banks standing despite the direct impact of the challenged Treasury regulation on *many* bank customers; the Solicitor General's brief in *California Bankers*, however, suggested that depositors affected by the regulation in question were not so common as to make their business with the plaintiff banks predictable. *Compare Haitian Refugee Center*, 809 F.2d at 809, *with* Brief for the Appellants, *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974).

[12] The Center, seeking to assist Haitian refugees settle in the United States, was not in a vendor-vendee relationship with the interdicted Haitians whose interests the Center sought to advance.

88, 305 n. 149 (1984); *see also* Rohr, *supra*, 35 U. Miami L.Rev. at 461 n. 290 (case law shows uniquely firm denial of third-party standing to invoke the "exclusionary rule" of criminal procedure). We therefore conclude that *FAIC Securities* continues to state law of the circuit, binding upon us unless and until changed by the court sitting en banc, or shown to be incorrect by instruction from Higher Authority.[13] If the *FAIC Securities* deposit brokers' and depositors' interests are "two sides of the same coin," 768 F.2d at 359, so too are 3M's interest in selling the disposable respirators it manufactures, and cotton processing plant operators' interest in purchasing the respirators.[14] If the brokers had standing in *FAIC Securities*, then 3M has standing here; no tenable distinction can be drawn between the relationship of the litigant and third party in the two cases.

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[13] Even under *Haitian Refugee Center*'s view of *FAIC Securities*, we note, 3M would appear to have standing in this case. *Haitian Refugee Center* observes that litigants may challenge, pursuant to their own right not to be injured by unauthorized agency action, any regulation allegedly *ultra vires* the statutes administered by the agency. 809 F.2d at 811 n. 13. 3M complains that OSHA's allegedly excessive regulation of disposable respirators passes beyond the authority afforded OSHA in the OSH Act. 29 U.S.C. § 651 *et seq.* Just as *Haitian Refugee Center* recognized the standing of the deposit brokers in *FAIC Securities* to sue in their own right, so *Haitian Refugee Center* would seem to tolerate 3M's standing to sue in its own right.

[14] The decisions principally relied upon by OSHA, *R.T. Vanderbilt Co. v. Occ. Saf. & H. Rev. Comm'n*, 708 F.2d 570 (11th Cir. 1983), and *Fire Equipment Mfrs. Ass'n, Inc. v. Marshall*, 679 F.2d 679 (7th Cir.1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 728, 74 L.Ed.2d 953 (1983), hold that the right of product manufacturers to deal with their customers falls outside the zone of interest of the OSH Act. Neither decision considered the product manufacturer's opportunity to rely on the interest of its customers to fit within the zone. *Fire Equipment Mfrs.* did consider third-party standing, but only in the context of employers' ability to assert employee rights and, arguably, of product manufacturers to assert the rights of customers' employees.

Following *FAIC Securities*, we are constrained to recognize 3M's standing on the basis of "the vendor-vendee relationship alone." *Id.* at 361.[15]

B. *Merits*

3M features three bases for declaring arbitrary OSHA's assignment, in its cotton dust regulations, of a protection factor of only five to disposable respirators. First, 3M asserts that feasible tests of proper fit, if unavailable in 1978, are available now. Second, 3M points to the higher (ten) rating accorded disposable respirators by national standard-setting organizations. Third, and most weighty in 3M's presentation, OSHA itself, in standards the agency adopted for the lead industry in 1982, approved establishment of a protection factor of ten for disposable respirators. We examine each 3M position in turn.

Two procedures, the saccharin QLFT [16] and the positive pressure fit check (PPFC),[17] 3M states, are available to test disposable respirators for face-fit; each, 3M

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[15] Judge Scalia noted the "admirable effort to bring coherence to the vendor-vendee cases" in Monaghan, *Third Party Standing*, 84 Colum.L.Rev. 277 (1984) (cited in *FAIC Securities*, 768 F.2d at 360 n. 5). Professor Monaghan observed that the Supreme Court has never limited a litigant's standing to cases in which the complainant (rather than a third party) is the subject of government regulations. *Id.* at 302-03 nn. 138-40 (citing, *i.e.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915)).

[16] To take the saccharin QLFT test, the subject puts on the respirator and breathes normally. A saccharin aerosol is sprayed near the subject. Because the aerosol cannot penetrate the disposable respirator filter, if the subject tastes the sweet saccharin, the respirator fits improperly.

[17] The PPFC procedure requires the test subject to cover with his hands the portion of the respirator intended to permit air intake. If, on inhaling, the subject gets no air, the respirator fits properly.

contends, is independently adequate to do the job. If 3M were right about the adequacy of these tests, we would be obliged to rule in its favor; the sole reason OSHA gave for rating disposable respirators at five rather than ten is the inability of the cotton plant operator and worker to check reliably for proper fit.

OSHA acknowledges that the saccharin QLFT will detect improper fit. But the test is not proffered by 3M as one the plant operator will employ for each worker each day. As 3M conceded at oral argument, the saccharin test is intended for use every three or six months; the test, administered at these intervals, checks for alteration in a wearer's facial contours that might affect the fit of the respirator. OSHA observed that "it is not appropriate to require the employers to conduct the saccharin QLFT each time the respirator is worn since it is time consuming. . . ." 50 Fed.Reg. 51,154 (1985). Unsurprisingly, 3M does not press for such a requirement, one likely to increase the cost, and reduce the attractiveness, of its product to employers.

The PPFC procedure is an effective daily check for the fit of a gas-mask style respirator. Respirators of that type confine intended air intake to valves that can be blocked off easily by the employee's hands. By contrast, the entire surface of a disposable respirator is intended to permit air intake. OSHA recognized that, in the case of disposable respirators, the worker's hands cannot effectively block intended air intake, and that intake only, while leaving unobstructed air taken in because of the respirator's improper fit. *See supra* note 6.[18] We think it evident that OSHA did not rule without

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[18] 3M referred to a study it had conducted on twenty-three of its employees, purportedly showing that the PPFC will "pass" no one whose disposable respirator fits in a fashion providing actual protection at less than a factor of ten. It suffices to note that the small size of the 3M study justified OSHA's refusal to count it persuasive.

reason when it adhered to the view that no test appropriate for daily use adequately assured the proper fit for disposable respirators.

We consider next 3M's second point. Both NIOSH and the Committee on Safety Standards for Respiratory Protection of the American National Standards Institute ("ANSI") have rated disposable respirators at ten. But neither organization took account of respirator fit; both based their ratings on filter performance. Absent assurance of a respirator's proper fit, the NIOSH and ANSI ratings can reliably indicate only the efficiency of the filter, not the effectiveness of the entire respirator as it is used on the job.[19] In 1978, OSHA rated single-use respirators at five because of the considerable risk of undetected leakage when worn at work. *See* 43 Fed.Reg. 27,386 (1978).[20] With no evidence of significant improvement in a user's ability to thwart leakage, OSHA continued in force its prior judgment. *See* 50 Fed.Reg. 51,154 (1985) ("A protection factor of 5 for the class of disposable dust and mist respirators is the appropriate protection factor to provide an adequate margin of safety to overcome the fitting problem.").[21] We see no

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[19] When proper fit can be assured, as in the case of respirators with easily blocked air-intake valves, the NIOSH and ANSI standards present a fair assessment of respirator effectiveness as well as filter efficiency. Thus, OSHA's adoption of ANSI ratings for some respirators, but not for disposable respirators, seems entirely rational.

[20] 3M suggests that OSHA was wrong in 1978 when it concluded that single-use respirators could not achieve protection warranting a rating of ten. Time for that challenge has long since passed. *See* 29 U.S.C. § 655(f). We do not understand 3M to contend that this court should review the 1978 evidence in its consideration of the rulemaking completed in 1985. *See* Brief for Petitioner [Minnesota Mining and Manufacturing] at 26-28.

[21] 3M does not suggest that improved filter efficiency alone warrants treating its disposable respirator differently from the single-use respirator OSHA dealt with in 1978.

necessity for change based on ratings of filters rather than disposable respirators in their entirety.

Finally, we evaluate the challenge to which 3M attaches greatest weight. While disposable respirators are rated at five for use in the cotton industry, the very same respirators can be rated at ten in the lead industry, 3M emphasizes. OSHA explains that this disparate treatment is attributable primarily to differences in the effectiveness of medical screening in the two industries. Medical screening for lead adequately substitutes for daily fit testing, OSHA maintains, but medical screening for lung diseases from cotton dust does not. *Cf.* 51 Fed.Reg. 22,735 (1986) (to be codified at 29 C.F.R. § 1910.1001(g)(2)) (disposable respirators declared inadequate, hence unusable, as a means of affording any protection against exposure to asbestos).

Blood lead tests provide an immediate and direct indication of the presence of lead in a worker's body. Although the source of the lead detected (for example, whether it was inhaled as a result of an improperly fitted respirator) is not identifiable, a worker can be safeguarded promptly. He can be supplied with a gas-mask style respirator or removed from a lead-laden environment immediately upon screening, before adverse health effects develop. Workers in the lead industry are tested at six month intervals. OSHA determined that six months' exposure to lead between blood tests presents an acceptable health risk, and we have no reason, on the record before us, to question that determination. Because of the efficacy of monitoring blood-levels, OSHA found it suitable to allow disposable respirators, when used in the lead industry, a protection factor rating of ten.

By contrast, current medical screening of workers is incapable of detecting cotton dust inhalation immediately and unmistakably. Medical tests in the cotton industry

rely, in part, on worker identification of symptoms. The administrative record here suggests that workers do not always acknowledge the presence of symptoms. J.A. at 49, 187. Further, the tests detect only actual lung impairment. Medical screening does not isolate cotton dust from other airborne contaminants that cause lung impairment; more significantly, medical tests expose the potential presence of a contaminant only by detecting actual adverse health effects. The administrative record does indicate that early manifestations of lung impairment are reversible. At least some health impairment, however, even if curable, develops before a cotton worker furnished with a disposable respirator can be informed of her plight through medical screening, and thus be alerted to the need to substitute a gas-mask style respirator or to transfer to a work station away from dusty areas.[22]

OSHA, we conclude, has adequately accounted for its position. We cannot set aside as irrational that expert agency's determination that the precision of medical testing for lead in comparison to the imprecision of testing for cotton dust inhalation warrants the differential rating of disposable respirators in the two industries.

CONCLUSION

For the reasons stated, the petitions for review are denied and the challenged regulations are affirmed.

It is so ordered.

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[22] The cotton dust regulations, we note, require screening every one or two years for most workers, and every six months only for workers identified as already suffering from lung impairment. 29 C.F.R. § 1910.1043(h)(3) (1986). OSHA might have required more frequent medical screening, but 3M's plea does not demonstrate that the agency's decision to rate disposable respirators at five and continue the existing screening schedule indicates an impermissible choice between the competing interests and costs at stake.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2014

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor and
EULA BINGHAM, Assistant Secretary of Labor,
United States Department of Labor;
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
United States Department of Labor,
Respondents

No. 86-1075

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,
U.S. Department of Labor, *et al.*,
Respondents

No. 86-1157

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
et al.,
Respondents

Petitions for Review of Orders of the
Occupational Safety and Health Administration

[Filed Aug. 7, 1987]

Before: ROBINSON, RUTH B. GINSBURG and WILLIAMS, Circuit Judges.

These causes came on to be heard on the petitions for review of orders of the Occupational Safety and Health Administration, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the petitions for review are denied and the challenged regulations are affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 7, 1987

Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg and Circuit Judge Williams.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2014

NATIONAL COTTONSEED PRODUCTS ASSOCIATION

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*
And Consolidated Cases

[Filed Oct. 23, 1987]

Before: ROBINSON, RUTH B. GINSBURG and WILLIAMS, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2014

NATIONAL COTTONSEED PRODUCTS ASSOCIATION

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*
And Consolidated Cases

[Filed Oct. 23, 1987]

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Petitioner's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Sentelle did not participate in this order.

APPENDIX D

Section 3(8) of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 652(8), provides:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Section 6(b) of the OSH Act, 29 U.S.C. § 655(b), in pertinent part provides:

> The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:
>
> * * * *
>
> (5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed

in terms of objective criteria and of the performance desired.

* * * *

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience,

information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

29 C.F.R. § 1910.1043, 50 Fed.Reg. 51173 (Dec. 13, 1985), in pertinent part provides:

(a) (3) Only paragraphs (h) Medical surveillance, (k) (2)-(4) Recordkeeping—Medical Records, and Appendices B, C and D of this section apply in all work places where employees exposed to cotton dust engage in cottonseed processing or waste processing operations.

* * * *

(h) Medical surveillance—(1) *General.* (i) Each employer covered by the standard shall institute a program of medical surveillance for all employees exposed to cotton dust.

(ii) The employer shall assure that all medical examinations and procedures are performed by or under the supervision of a licensed physician and are provided without cost to the employee.

(iii) Persons other than licensed physicians, who administer the pulmonary function testing required by this section shall have completed a NIOSH-approved training course in spirometry.

(2) *Initial examinations.* The employer shall provide medical surveillance to each employee who is or may be exposed to cotton dust. For new employees, this examination shall be provided prior to initial assignment. The medical surveillance shall include at least the following:

(i) A medical history;

(ii) The standardized questionnaire contained in Appendix B; and

(iii) A pulmonary function measurement, including a determination of forced vital capacity (FVC)

and forced expiratory volume in one second (FEV_1), the FEV_1/FVC ratio, and the percentage that the measured values of FEV_1 and FVC differ from the predicted values, using the standard tables in Appendix C. These determinations shall be made for each employee before the employee enters the workplace on the first day of the work week, preceded by at least 35 hours of no exposure to cotton dust. The tests shall be repeated during the shift, no less than 4 and and no more than 10 hours after the beginning of the work shift; and, in any event, no more than one hour after cessation of exposure. Such exposure shall be typical of the employee's usual workplace exposure. The predicted FVE_1 and FVC for blacks shall be multiplied by 0.85 to adjust for ethnic differences.

(iv) Based upon the questionnaire results, each employee shall be graded according to Schilling's byssinosis classification system.

(3) *Periodic examinations.* (i) The employer shall provide at least annual medical surveillance for all employees exposed to cotton dust above the action level in yarn manufacturing, slashing and weaving, cotton washing and waste house operations. The employer shall provide medical surveillance at least every two years for all employees exposed to cotton dust at or below the action level, for all employees exposed to cotton dust from washed cotton (except from washed cotton defined in paragraph (n)(3) of this section), and for all employees exposed to cotton dust in cottonseed processing and waste processing operations. Periodic medical surveillance shall include at least an update of the medical history, standardized questionnaire (App. B-111), Schilling byssinosis grade, and the pulmonary function measurements in paragraph (h)(2)(iii) of this section.

(ii) Medical surveillance as required in paragraph (h)(3)(i) of this section shall be provided every

six months for all employees in the following categories:

(A) An FEV_1 of greater than 80 percent of the predicted value, but with an FEV_1 decrement of 5 percent or 200 ml. on a first working day;

(B) An FEV_1 of less than 80 percent of the predicted value; or

(C) Where, in the opinion of the physician, any significant change in questionnaire findings, pulmonary function results, or other diagnostic tests have occurred.

(iii) An employee whose FEV_1 is less than 60 percent of the predicted value shall be referred to a physician for a detailed pulmonary examination.

(iv) A comparison shall be made between the current examination results and those of previous examinations and a determination made by the physician as to whether there has been a significant change.

(4) *Information provided to the physician.* The employer shall provide the following information to the examination [*sic*] physician:

(i) A copy of this regulation and its Appendices;

(ii) A description of the affected employee's duties as they relate to the employee's exposure;

(iii) The employee's exposure level or anticipated exposure level;

(iv) A description of any personal protective equipment used or to be used; and

(v) Information from previous medical examinations of the affected employee which is not readily available to the examining physician.

(5) *Physician's written opinion.* (i) The employer shall obtain and furnish the employee with a copy of a written opinion from the examining physician containing the following:

(A) The results of the medical examination and tests including the FEV_1, FVC, AND [*sic*] FEV_1/FVC ratio;

(B) The physician's opinion as to whether the employee has any detected medical conditions which would place the employee at increased risk of material impairment of the employee's health from exposure to cotton dust;

(C) The physician's recommended limitations upon the employee's exposure to cotton dust or upon the employee's use of the respirators including a determination of whether an employee can wear a negative pressure respirator, and where the employee cannot, a determination of the employee's ability to wear a powered air purifying respirator; and,

(D) A statement that the employee has been informed by the physician of the results of the medical examination and any medical conditions which require further examination or treatment.

(ii) The written opinion obtained by the employer shall not reveal specific findings or diagnoses unrelated to occupational exposure.

* * * *

(k)(2) *Medical surveillance.* (i) The employer shall establish and maintain an accurate medical record for each employee subject to medical surveillance required by paragraph (h) of this section.

(ii) The record shall include:

(A) The name and social security number and description of the duties of the employee;

(B) A copy of the medical examination results including the medical history, questionnaire response, results of all tests, and the physician's recommendation;

(C) A copy of the physician's written opinion;

(D) Any employee medical complaints related to exposure to cotton dust;

(E) A copy of this standard and its appendices, except that the employer may keep one copy of the standard and appendices in the medical surveillance record of each employee; and

(F) A copy of the information provided to the physician as required by paragraph (h)(4) of this section.

(iii) The employer shall maintain this record for at least 20 years.

(3) *Availability.* (i) The employer shall make all records required to be maintained by paragraph (k) of this section available to the Assistant Secretary and the Director for examination and copying.

(ii) Employee exposure measurement records and employee medical records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a)-(e) and (g)-(i).

(4) *Transfer of records.* (i) Whenever the employer ceases to do business, the successor employer shall receive and retain all records required to be maintained by paragraph (k) of this section.

(ii) Whenever the employer ceases to do business, and there is no successor employer to receive and retain the records for the prescribed period, these records shall be transmitted to the Director.

(iii) At the expiration of the retention period for the records required to be maintained by this section, the employer shall notify the Director at least 3 months prior to the disposal of such records and shall transmit those records to the Director if the Director requests them within that period.

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

No. 87-1214

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
PETITIONER

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Occupational Safety and Health Administration's cotton dust standard properly requires monitoring and medical testing of cottonseed processing employees, in order to protect the health of especially susceptible employees and to check the accuracy of the risk assumptions underlying removal of a longstanding exposure limit.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 825 F.2d 482. The Secretary of Labor's amended cotton dust standard and statement of reasons in support of the regulation appear at 50 Fed. Reg. 51120-51179 (1985).

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on August 7, 1987. A timely petition for rehearing, with suggestion of rehearing en banc, was denied on October 23, 1987 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on January 20, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the Act), empowers the Secretary of Labor to adopt occupational safety and health standards, which are defined by Section 3(8) of the Act as requirements "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 U.S.C. 652(8)). Section 6(a) required the Secretary, within two years of the Act's enactment and without formal rulemaking proceedings, to adopt as occupational safety or health standards existing "national consensus" or "established Federal standards" (29 U.S.C. 655(a)). In addition, Section 6(b) of the Act authorizes the Secretary to promulgate, modify or revoke standards, through notice and comment rulemaking (29 U.S.C. 655(b)). Whenever a rule promulgated pursuant to Section 6(b)(8) "differs substantially from an existing national consensus standard," the Secretary must set forth in the Federal Register the reasons the rule adopted will "better effectuate the purposes of" the Act (29 U.S.C. 655(b)(8)). Section 6(b)(5) requires that in regulating exposure to "toxic materials or harmful physical agents," the Secretary must promulgate the standard which, "on the basis of the best available evidence," will provide the greatest level of protection feasible (29 U.S.C. 655(b)(5)). Where appropriate, standards also "shall prescribe * * * medical examinations or other tests" at employers' expense, "in order to most effectively determine whether the health of * * * employees is adversely affected by * * * exposure" to a regulated hazard (29 U.S.C. 655(b)(7)).

2. In 1971, pursuant to Section 6(a), the Secretary adopted the standard established under the Walsh-Healey Act, 41 U.S.C. 35(e), of 1000 ug/m3 (micrograms per cubic meter) as the industry-wide standard governing ex-

posure to airborne concentrations of cotton dust (Pet. App. 3a). In 1976, the Occupational Safety and Health Administration (OSHA) announced its intention to promulgate a permanent Section 6(b) cotton dust standard (41 Fed. Reg. 56498), and after amassing a voluminous record, published a final rule in 1978 covering all aspects of cotton dust exposure in textile and non-textile industries (43 Fed. Reg. 27350).[1] For the cottonseed processing industry, in which petitioner's members are engaged, the 1978 standard prescribed a permissible exposure limit (PEL) of 500 ug/m3 and required cottonseed oil mills to institute medical surveillance programs, providing for initial placement and annual medical screening of employees (Pet. App. 3a).[2]

This standard never took effect for cottonseed processing and other non-textile industries, however, because of litigation before the court of appeals and this Court. *AFL-CIO* v. *Marshall*, 617 F.2d 636 (D.C. Cir. 1979), aff'd in part and vacated in part *sub nom. American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490 (1981).[3] Accordingly, the cottonseed processing industry has remained continuously subject to the Section 6(a) PEL of 1000 ug/m3 (Pet. App. 3a).

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[1] The toxic nature of cotton dust, its acute and chronic effects on pulmonary function, and the history of its regulation are fully discussed in *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490 (1981).

[2] Cottonseed processing involves breaking down untreated cottonseed into linters (coarse fuzz) and seed hulls and kernels. The process is dusty and the linters contain contaminants similar to those in baled cotton fiber. After cleaning, linters are baled and the seed remnants are used to produce cottonseed oil and meal. 43 Fed. Reg. 27350, 27369 (1978).

[3] The court of appeals remanded the record for cottonseed processing only for reconsideration of the standard's economic feasibility. *AFL-CIO* v. *Marshall*, 617 F.2d at 669. Thereafter, when this Court remanded the other non-textile segments for reconsideration in light of *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607

On remand from the litigation, the Secretary reviewed a number of cross-sectional health studies of American and foreign cottonseed processing workers, as well as medical expert testimony regarding health risks and protective measures (Pet. App. 7a; 50 Fed. Reg. 51133-51137 (1985); 48 Fed. Reg. 26966-26967 (1983)). The studies of domestic cottonseed workers uniformly demonstrated that a number of cottonseed workers manifest impaired lung function at current levels of cotton dust exposure in cottonseed oil mills, which is especially linked to length of employment, exposure at early steps of processing, general and specific allergies, and smoking (Pet. App. 7a; 50 Fed. Reg. 51133-51134 (1985)). There was, however, no affirmative evidence of increased prevalences of byssinosis,[4] or of a dose-response relationship at current exposure levels (*ibid.*). Studies of foreign cottonseed workers, however, showed increased prevalences of byssinosis and other chronic lung disease at very high exposure levels (Pet. App. 7a, 8a; 50 Fed. Reg. 51133, 51135 (1985)). All medical experts agreed that the dust in cottonseed oil mills is not a "mere nuisance," but rather has " 'some biologic activity of a kind similar to that found in cotton textile mills' " (Pet. App. 7a; 50 Fed. Reg. 51134-51135 (1985) (citation omitted)). These experts unanimously recommended medical surveillance of those working in the cottonseed industry to protect the health of especially susceptible workers and to develop an appropriate evidentiary

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(1980), see *Cotton Warehouse Ass'n* v. *Marshall*, 449 U.S. 809 (1980), the Secretary undertook a similar review for cottonseed processing too.

[4] Byssinosis, also known as "brown lung" disease, is a respiratory ailment characterized by coughing, breathlessness or tightness of the chest. See 50 Fed. Reg. 51125 (1985).

base for making an accurate assessment of true risk (Pet. App. 7a; 50 Fed. Reg. 51134 (1985)).[5]

Applying the significant risk analysis mandated by *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607 (1980) [hereinafter *Benzene*],[6] the Secretary found that there was "not sufficient evidence of significant risk [within the cottonseed industry] which could be substantially reduced by lowering exposure limits" (50 Fed. Reg. 51135 (1985)). The Secretary therefore declined to establish a new, lower Section 6(b) exposure limit (*ibid.*). Similarly, the Secretary concluded from the same evidence that removal of the existing Section 6(a) PEL would not lead to significant health risk (50 Fed. Reg. 51136 (1985)).

The Secretary concluded, however, that he could find no significant risk in removing the existing PEL only if a "backstop" program of medical monitoring of employees was retained, in order to assess the correctness of that judgment and to protect unusually susceptible workers (50 Fed. Reg. 51135-51136 (1985)). Accordingly, the Secretary imposed on the industry the medical surveillance and related recordkeeping requirements of the cotton dust standard.[7] The Secretary found direct support for this

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[5] One expert stressed that the true risk for cottonseed workers may be underestimated by the large cross-sectional studies in the record (50 Fed. Reg. 51133-51134 (1985)). He noted that medical surveillance would provide the type of longitudinal data necessary to make an accurate assumption about the real level of risk in cottonseed oil mills (*ibid.*).

[6] The Secretary described his analytical approach to the significant risk analysis, including the factors to be taken into account in making rational policy judgments regarding risk, at 50 Fed. Reg. 51131 (1985).

[7] These provisions, set out at 29 C.F.R. 1910.1043(h)(2) and (k)(2)-(4), require employers to provide initial placement medical screening, followed by routine screening every two years, except for

action in a passage in *Benzene* (448 U.S. at 657-658), where this Court approved in dictum "a backstop in the form of monitoring and medical testing," imposed in conjunction with standards set at exposure levels below those of significant risk. Such monitoring allows OSHA to " 'keep a constant check on the validity of the assumptions made in developing the permissible exposure limit, giving it a sound evidentiary basis for decreasing the limit if it was initially set too high' " and to " 'ensure that workers who were unusually susceptible * * * could be removed from exposure before they had suffered any permanent damage' " (50 Fed. Reg. 51135 (1985) (quoting 448 U.S. at 658)).

This dictum applied here, the Secretary explained, because the decision to remove exposure limits was based on less-than-perfect evidence and two of the reasons cited by *Benzene* for a medical surveillance backstop were directly implicated by the record. Specifically, a backstop was necessary to "check on the validity of the assumption[]" that deregulation would not lead to significant health risks, since exposures might rise after the PEL was removed and the foreign studies showed an increased incidence of chronic lung disease at higher exposure levels, and thus an affirmative dose-response relationship (50 Fed. Reg. 51135 (1985)). Moreover, there was a clear medical need for such monitoring to identify and protect especially susceptible workers who, even at current exposure levels, had been shown to be at risk (*id.* at 51136). Accordingly, the Secretary determined not to exempt the

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those employees as to whom the results of testing indicate that more regular testing (*i.e.*, every six months) is appropriate. The tests include completion of a prescribed questionnaire; objective pulmonary function tests; and completion of a physician's report containing specified information. The recordkeeping requirements of Section 1910.1043(k)(2)-(4) are keyed to these medical screening provisions.

cottonseed processing industry from the medical surveillance requirements of the cotton dust standard.

3. Petitioner National Cottonseed Products Association sought review, pursuant to 29 U.S.C. 655(f), of the cotton dust standard as it applies to the cottonseed processing industry. The court of appeals upheld the medical surveillance requirements as "sanction[ed]" by "an unusually precise dictum in *Benzene*" (Pet. App. 4a). The court explained that the *Benzene* Court specifically addressed the Secretary's regulatory options where she is "uncertain whether the residual risk [at the selected exposure level is] significant" (*id.* at 6a). In such circumstances, the Secretary has authority, as explained in *Benzene,* to require backstop employee health monitoring to check the validity of the assumptions regarding the exposure limit selected, to develop sound evidence for changing the exposure limit, and to "ensure that unusually susceptible workers could be removed from exposure before they suffered permanent damage" (*ibid.*, citing *Benzene,* 448 U.S. at 657-658). Thus, *Benzene* permits "backstop monitoring" where the " 'less-than-perfect' " evidence upon which OSHA relies "indicates * * * a real possibility of significant health risks under the other aspects of the standard adopted (here, no regulation at all)" (Pet. App. 8a).

The court also found the evidence in the rulemaking record sufficient to "invoke the conditions suggested by * * * *Benzene* for a backstop monitoring requirement" (Pet. App. 8a). The studies of cottonseed workers and experts' testimony disclosed that, at existing exposure levels, domestic cottonseed workers as a group suffer from decreased lung function, even though they do not experience an increased incidence of byssinosis (*id.* at 7a). And a subset of hypersensitive workers suffer from

respiratory ailments (*id.* at 4a, 7a). Moreover, foreign cottonseed workers subject to higher doses than domestic workers experience significant health effects, suggesting a dose-response relationship (*id.* at 7a). Thus, the Secretary appropriately concluded that "the risk of material harm to cottonseed workers would not be 'significant' even without a PEL, so long as medical surveillance was retained as a 'backstop' " (*id.* at 4a (quotation in original)).

Responding to petitioner's argument that medical surveillance may be required only where OSHA identifies some " 'reasonably attainable level' " at which harm will occur, the court of appeals noted that OSHA was hampered in making such a determination here because of the "ambiguous relation between reality and the pre-existing regulation" (Pet. App. 6a).[8] The court of appeals concluded, however, that application of the *Benzene* dictum was justified by the evidence of risk before OSHA, from which it reasonably inferred that exposures might rise, to the detriment of worker health, with the removal of exposure limits (*id.* at 6a-7a). The court agreed with the Secretary that under these circumstances, medical surveillance was necessary both to protect worker health and to provide an evidentiary basis for assessing the validity of the assumptions upon which OSHA relied in eliminating the PEL.[9]

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[8] The court noted general agreement that the cottonseed industry "has not complied with the 1000 ug/m3" PEL, but stressed that "there is no concession that the regulations of the past 16 years have been absolutely without effect," and that one study found that 16 of 18 mills maintained mean exposure levels at or below the PEL (Pet. App. 6a).

[9] The court also rejected petitioner's claims that compliance with the medical surveillance requirements is not technologically or economically feasible for the industry. Petitioner does not seek review of this aspect of the court's ruling, although it asserts that medical surveillance is costly and inconvenient (Pet. 14). The court of appeals

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. The court below correctly held that the Secretary's decision to require "backstop" medical surveillance of cottonseed industry workers falls squarely within an "unusually precise" dictum in the *Benzene* decision. The central thrust of the pertinent passage (448 U.S. at 657-658) is that backstop monitoring may be required even at exposure levels with respect to which no significant risk is shown. To justify such "backstop" monitoring, the Secretary must reasonably conclude, based on the best available evidence, that there is residual risk at those lower exposure levels which warrants prophylactic regulatory action. See 448 U.S. at 657-658. As the court of appeals held, the Secretary properly found that the rulemaking record invoked precisely the same conditions identified in *Benzene* as warranting backstop monitoring.[10]

First, as the court found, the record conclusively established a class of unusually susceptible cottonseed

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upheld OSHA's conclusion that the costs of compliance here with the medical surveillance requirements were minuscule (slightly over $70,000 annually, or less than 0.01% of the industry's annual gross revenues of $777.6 million), finding that any errors made by OSHA in its cost analysis were "trivial" and inconsequential (Pet. App. 11a-12a).

[10] Section 6(f) of the Act, 29 U.S.C. 655(f), prescribes "substantial evidence" review of the Secretary's determinations. The court below carefully reviewed the evidence upon which the Secretary had relied in this case, as well as contradictory evidence in the record, and found the evidence supported the medical surveillance standard. Petitioner does not challenge the court's decision on substantial evidence grounds.

workers who suffered impaired lung function even at current levels of cotton dust exposure. As in *Benzene,* medical surveillance would protect their health by permitting their removal from exposure. See Pet. App. 6a; compare 50 Fed. Reg. 51135-51136 (1985) (monitoring allows removal of unusually susceptible persons from particularly dusty jobs); *Benzene,* 448 U.S. at 658 (footnote omitted) (monitoring "could ensure that workers who were unusually susceptible to benzene could be removed from exposure before they had suffered any permanent damage").[11]

The record also demonstrated clear increased prevalences of byssinosis and other chronic lung diseases among workers in foreign cottonseed oil mills, where exposure levels are higher. Given the real possibility that exposures in American cottonseed mills might rise with the removal of the Section 6(a) PEL,[12] backstop monitoring

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[11] Numerous decisions uphold the imposition of medical testing and other remedial requirements at action levels lower than established exposure limits, in order to protect especially susceptible workers. See, *e.g., GAF Corp.* v. *Occupational Safety & Health Review Comm'n,* 561 F.2d 913 (D.C. Cir. 1977) (cited approvingly in the *Benzene* discussion of backstop surveillance, upholding the requirement of medical examinations for employees exposed to *any* airborne concentrations of asbestos); *Forging Indus. Ass'n* v. *Secretary of Labor,* 773 F.2d 1436, 1443-1444 (4th Cir. 1985) (en banc) (upholding hearing conservation amendment to noise exposure standard, providing for testing and appropriate follow-up measures, as needed, for employees exposed to noise levels at action levels below the PEL); *United Steelworkers* v. *Marshall,* 647 F.2d 1189, 1237 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981) (upholding the medical removal provisions of the lead standard, keyed to the results of medical surveillance and biological monitoring of employees exposed to lead concentrations significantly lower than the PEL).

[12] Petitioner argues (Pet. 14) that industry was not in compliance with the existing PEL, and thus that it was unreasonable to assume

was necessary to check the validity of the basic assumption that elimination of the PEL would not give rise to significant risk. There is thus no merit to petitioner's contention (Pet. 12-13) that the court below sanctioned impermissible employer-financed data gathering of merely possible health risks. See Pet. App. 7a; 50 Fed. Reg. 51136 (1985) (medical surveillance "provide[s] a backstop if [OSHA's] judgment [on significant risk] is incorrect"); *Benzene*, 448 U.S. at 658 (footnote omitted) (OSHA "could keep a constant check on the validity of the assumptions made in developing the permissible exposure limit, giving it a sound evidentiary basis for decreasing the limit if * * * initially set too high"). This Court specifically approved this "type of information-gathering" as contemplated by Section 6(b)(7), "which empowers the Secretary to require medical examinations to be furnished to employees exposed to certain hazards and *potential hazards*, 'in order to most effectively determine' " whether worker health is adversely affected by such exposure. *Benzene*, 448 U.S. at 658 n. 66 (citations omitted; emphasis added). Thus, the Secretary properly concluded that significant risk would not result from removal of the Section 6(a) PEL only if conditioned on backstop medical surveillance.[13] In these

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that elimination of the PEL might lead to material health impairment. The court of appeals correctly rejected this argument, stressing that because "there is no concession that the regulations of the past 16 years have been absolutely without effect," and, in fact, some record evidence reflects substantial compliance, the Secretary could "fairly infer" that removal of the PEL could result in increased exposure (Pet. App. 6a).

[13] Seizing on the precise fact situation described in *Benzene*, petitioner argues that the dictum must be read in exceedingly literal fashion, and that backstop monitoring may only be imposed as an adjunct to a PEL or at levels at which significant risk is identified (Pet. 10-11). The court of appeals rightly rejected this constrained ap-

circumstances, the court of appeals correctly held that *Benzene*'s "unusually precise dictum" specifically sanctions the backstop medical surveillance standard imposed on the cottonseed industry in this case.[14]

2. Nor does the decision of the court below conflict with *Texas Independent Ginners Ass'n* v. *Marshall,* 630 F.2d 398 (5th Cir. 1980), as petitioner asserts (Pet. 11-12). First, the nature of the regulatory actions and their stated justifications are quite different. The cotton ginning standard imposed a number of work practices and other protective measures in addition to medical testing.[15] See 630 F.2d at 402-403. The Secretary rested the standard's requirements on a finding of health hazards at existing unregulated exposure levels. The Fifth Circuit rejected the standard in its entirety because it concluded that the Secretary's finding—characterized as "OSHA's finding of

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proach, which would effectively rob the dictum of its meaning. As the court of appeals noted, this Court plainly did not confine backstop monitoring to the precise facts of its hypothetical, nor is there any sound reason to do so. Rather, the court of appeals correctly recognized that deleting an exposure limit, like lowering or raising a limit, is a regulatory judgment with respect to which imposition of medical surveillance as a backstop may be appropriate (Pet. App. 8a).

[14] Petitioner erroneously argues (Pet. 11) that this Court would have upheld the medical surveillance requirements in *Benzene* if it believed that medical surveillance could be imposed in the absence of a PEL. But this Court specifically noted in *Benzene* that it was dealing only with the exposure limits set by the Secretary, and declined to rule on any other aspects of the standard. See, *e.g.*, 448 U.S. at 630 n.30.

[15] In addition to medical surveillance, the cotton ginning standard required work practice plans to minimize employee exposure to cotton dust; employee training programs; provision of disposable respirator masks to all employees desiring them and air powered air purifying respirators to certain other employees; and posting of workplace warnings regarding the dangers of cotton dust. See 43 Fed. Reg. 27418 (1978); *Ginners,* 630 F.2d at 402-403.

a significant risk of a material health impairment" (*id.* at 407)—was not based on substantial evidence but rather on "assumptions without an adequate evidentiary basis" (*id.* at 409). The Fifth Circuit nowhere discussed or even alluded to the circumstances under which the Secretary may require medical surveillance as a backstop to permitted exposure at levels with respect to which no significant risk is shown. This omission is understandable since the Secretary did not justify the requirement on "backstop" grounds either in rulemaking or in the court of appeals.[16]

Ginners is also distinguishable from the decision below, because, as the Fifth Circuit noted, "the 1971 [Section 6(a)] PEL never applied to the ginning industry * * *" (630 F.2d at 403 n.20), and thus the case did not implicate the provision of the Act which pemits modification or revocation of a Section 6(a) standard only if "the rule as adopted will better effectuate the purposes" of the Act (29 U.S.C. 655(b)(8)). By contrast, the cottonseed industry has been continuously subject to the Section 6(a) PEL. Thus, to eliminate the Section 6(a) PEL applicable to the cottonseed industry, the Secretary was obligated to find that the evidence "affirmatively indicate[s]" that significant risk is "unlikely to exist" at exposures likely to prevail *after* the PEL was eliminated. See 50 Fed. Reg. 51132 (1985). As explained above, the Secretary determined that this judgment could be made if, and only if, conditioned on the availability of backstop medical surveillance. No PEL, combined with medical surveillance, results in both considerable savings to the industry and protection for highly susceptible workers and reevaluation of risk, thus better effectuating the Act's goal of protecting employee health. See *id.* at 51135-51136. In *Ginners,* on the other hand, the

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[16] *Ginners* was briefed and argued before *Benzene* was decided, even though it was issued shortly after *Benzene.*

court had no occasion to consider the circumstances under which a Section 6(a) exposure limit could properly be revoked or the link between revocation of a Section 6(a) limit and retention of medical monitoring as a backstop to that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-1214

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner,

v.

ANN DORE MCLAUGHLIN, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

The question in this case is whether section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b), authorizes the Secretary of Labor to promulgate an occupational health standard requiring medical examination and testing of employees in the absence of a finding that current (or even likely future) conditions in the workplace pose a significant risk of material health impairment. The government's brief in opposition does not speak to this question of statutory construction. Instead, the government argues as a matter of policy that the Secretary should have that authority. That argument misses the point of this case and is addressed to the wrong forum (and also is wrong).

This Court already has spoken to the question of statutory construction presented here. In *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 642 (1980), a plurality of the Court construed the Act as requiring the Secretary to make a threshold finding of significant risk "before [s]he can promulgate *any* permanent health or safety standard" (emphasis in original). The government does not even acknowledge that holding, let alone discuss its implications for this case. Nowhere does the government attempt to explain how the Act could be read in a manner that exempts occupational health standards relating to medical examination and testing from a requirement that applies to *all* occupational health standards.

Instead of coming to grips with the actual holding of *Industrial Union Department*, the government attempts to take refuge in a passage from the plurality opinion that it calls " 'unusually precise' dictum." Br. in Opp. at 8.[1] That passage merely explains that medical monitoring may be used as a "backstop" to an otherwise valid permissible exposure level. This means that the finding of significant risk that justifies the imposition of a permissible exposure level may also warrant an ancillary requirement of medical examination and testing. It does not mean that the Secretary may require such examination and testing in the absence of a finding of significant risk and when no permissible exposure limit has been imposed.

The government also fails to come to grips with the implications of *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980). In that case, the Fifth Circuit squarely held that medical examination and testing may not be required in the absence of a "finding of a significant risk of material health impairment." *Id.* at 407. The government offers two grounds for distinguishing that decision, neither of which has any merit.

[1] Citations to the brief in opposition are to the typescript version.

First, the government suggests that the cases can be distinguished because in *Texas Independent Ginners* the Secretary had "imposed a number of work practices and other protective measures in addition to medical testing." Br. in Opp. at 11. That is a distinction without a difference. The Fifth Circuit squarely addressed the question of medical testing, which was the principal health standard at issue in the case, and expressly held that such testing could not be required in the absence of significant risk. There is no logical basis for suggesting that the result would have been different if medical testing had been the only health standard at issue.

Second, the government argues that the Fifth Circuit "had no occasion to consider the circumstances under which a Section 6(a) exposure limit could properly be revoked or the link between revocation of a Section 6(a) limit and retention of medical monitoring as a backstop to that determination." Br. in Opp. at 12. The court below also had no occasion to consider, and in fact did not consider, the circumstances under which a section 6(a) exposure limit could be revoked; no one had challenged the Secretary's revocation of the section 6(a) limit of 1000 ug m^3 on exposure to all cotton dust. In this context the government's argument about "backstop" is pure bootstrap. If, as *Industrial Union Department* and *Texas Independent Ginners* hold, an occupational health standard under section 6(b) must rest upon a finding of significant risk of material health impairment, it makes no difference that a section 6(a) standard is being withdrawn.

The court below, as the government recognizes, has replaced the requirement of a threshold finding of significant risk with the watered-down requirement of a finding of "residual risk." Br. in Opp. at 8. This lower standard permits the Secretary to exercise a power that is denied to her both by the plurality opinion in *Industrial Union Department* and the Fifth Circuit's opinion

in *Texas Independent Ginners*. It enables the Secretary to say "I suspect (but do not know) that exposure to cotton dust [or some other substance] may pose a significant risk of material health impairment at levels considerably higher than those currently being experienced at the workplace, and I therefore am going to demand expensive and burdensome medical examination and testing even though I am unable to find that exposure at current or reasonably foreseeable future levels in fact poses such a risk."

Congress withheld that power from the Secretary, and rightly so. It is not reasonable or appropriate to saddle the employer with the expense and burden of medical monitoring when, as in this case, the Secretary only *suspects* that exposure may be risky at levels *considerably* higher than those either ever experienced in the past in the United States or likely to be experienced in the future.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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